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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Streamlining Broadcast EEO
Rules and Policies, Vacating
the EEO Forfeiture Policy
Statement and Amending Section
1.80 of the Commission's
Rules to Include EEO
Forfeiture Guidelines

MM Docket No. 96-16

REPLY COMMENTS OF CHRISTIAN LEGAL SOCIETY'S
CENTER FOR LAW AND RELIGIOUS FREEDOM;
CONCERNED WOMEN FOR AMERICA; AND
FOCUS ON THE FAMILY

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**REPLY COMMENTS OF CHRISTIAN LEGAL SOCIETY'S
CENTER FOR LAW AND RELIGIOUS FREEDOM,
CONCERNED WOMEN FOR AMERICA, AND
FOCUS ON THE FAMILY**

This letter serves as the response of the Christian Legal Society to the Reply Comments filed on August 12, 1996, in the above-captioned proceeding by the Americans United for Separation of Church and State, the American Civil Liberties Union, People for the American Way, and the Office of Communication of the United Church of Christ [hereinafter referred to as "Americans United for Separation of Church and State"], and the Reply Comments of the American Jewish Committee, dated August 9, 1996. Those Reply Comments responded to the Comments of Christian Legal Society's Center for Law and Religious Freedom, Concerned Women for America, and Focus on the Family, filed on July 11, 1996.

We continue to urge the Commission to amend its EEO policies to provide that a religiously affiliated broadcaster may prefer individuals of a particular faith for employment in all of its activities. Such action would amend the Commission's current approach, which allows a religious broadcaster to prefer members of its own faith only in those positions that the Commission concludes are directly connected with the espousal of the broadcaster's religious views.

The amendment would meet several important constitutional and policy objectives, including the following, which are discussed in detail in our Comments of July 11, 1996. These objectives include:

1. Conformity with Title VII and Supreme Court precedent:

With the amendment, the Commission's policy would conform to, rather than conflict with, Congress' policy of permitting religious organizations to prefer members of their own faith for employment in all of the organization's activities, as set forth in Title VII of the Civil Rights Act of 1964, which was held constitutional in Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987);

2. Protection of religious broadcaster's First Amendment free speech and free exercise rights, as well as federal statutory free exercise rights: The proposed amendment would protect a religious broadcaster's interest, protected by the First Amendment and the Religious Freedom Restoration Act, to employ members of its own faith in order to ensure that its activities are carried out by persons committed to the religious organization's religious views and mission;

3. Avoidance of an Establishment Clause violation by the FCC: The proposed amendment would prevent violation of the Establishment Clause of the First Amendment by FCC officials determining which jobs at a religious broadcaster's station involve the "espousal of the broadcaster's religious views" and which do not, -- precisely the type of government entanglement with, and monitoring of, religious activity prohibited by the Establishment Clause, see, e.g., Widmar v. Vincent, 454 U.S. 263, 272 n. 11; Amos, 483 U.S. at 343;

4. Avoidance of viewpoint discrimination against religious broadcasters: The proposed amendment would ensure religious broadcasters the same freedom that secular broadcasters have to choose employees who are committed to their philosophy and values and thereby avoids discriminatory treatment of religious viewpoints that is prohibited by the free speech clause of the First Amendment, see, e.g., Rosenberger v. Rector of University of Virginia, 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches School District, 113 S. Ct. 2141 (1993);

5. Relief to "distinctly situated broadcasters": The Commission would achieve the goal set forth in its Notice of Proposed Rulemaking to provide relief to "distinctly situated broadcasters," in this case "religious broadcasters," from unnecessary burdens created by the FCC's EEO policies;

6. Assuring diversity of viewpoints in public broadcasting: The proposed amendment achieves the Commission's goal of ensuring diversity in viewpoints broadcast to the public,

goal of ensuring diversity in viewpoints broadcast to the public, by ensuring that broadcasters with a religious viewpoint are allowed to define and broadcast their distinctive message.

The Reply Comments do not convincingly rebut these six objectives. In its Reply Comments, Americans United for Separation of Church and State virtually ignores the constitutional and statutory protections of the ability of religious broadcasters to be free from governmental interference in their consideration of applicants' religious viewpoints during the hiring process. The Reply Comments are equally silent in discussing the real Establishment Clause concerns raised by such governmental intrusion.

Instead, the Reply Comments make four main arguments that fail to counter the policy and constitutional reasons for allowing religious broadcasters to consider applicants' religious viewpoints in all hiring decisions. The Reply Comments are mistaken in four basic arguments, as follows:

1. Contrary to the Reply Comments, the First Amendment does protect broadcasters: Americans United for Separation of Church and State repeatedly focuses on two cases in which the FCC was allowed to regulate the speech of radio and television broadcasters in ways the government would not be allowed to regulate print media. However, even Americans United for Separation of Church and State admits that the circumstances in which the FCC can regulate the broadcast media are "limited." (Reply comments, p. 3). As the Supreme Court has recognized:

"[B]roadcasters are engaged in a vital and independent form of communicative activity. As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area. Unlike common carriers, broadcasters are entitled under the First Amendment to exercise the widest journalistic freedom consistent with their public duties. Indeed, if the public's interest in receiving a balanced presentation of views is to be fully served, we must necessarily rely in large part upon the editorial initiative and judgment of the broadcasters who bear the public trust."

Federal Communications Commission v. League of Women Voters of California, 468 U.S. 364, 378 (1984) (citations and quotation marks omitted).

2. Contrary to the Reply Comments, both the First Amendment and Title VII protect religious organizations that are not 'purely private': Americans United for Separation of Church and State tries to distinguish religious broadcasters from "purely private religious organizations." (Reply Comments, p. 3). However, the distinction serves no purpose. Title VII recognizes the freedom of a religious organization to prefer members of its own faith in employment in all of its activities. Section 702, 42 U.S.C. Sec. 2000e-1. This protection is not limited to "purely private religious organizations," but extends to religious corporations, associations, or societies, including religious universities and colleges that serve the public interest through education. Section 703 (e) (2).

The Reply Comments imply that religious organizations somehow lose their First Amendment rights when they venture into the public arena or are granted access by the government to a particular means of expression. This is not true. See, e.g., Rosenberger, supra

(university violated religious group's free speech rights when it denied funding to the group's publication solely because of its religious content); Lamb's Chapel, supra (public school officials violated religious community group's free speech rights when they denied the group access to the school auditorium on the same basis as other community groups addressing similar topics); Widmar, supra (public university violated religious group's free speech rights when it denied access to university buildings for meetings).

3. Contrary to the Reply Comments, the Supreme Court has not limited Title VII protection only to nonprofit activities of religious employers: Americans United for Separation of Church and State argue that allowing religious broadcasters to make employment decisions based on the religious viewpoints of applicants "fails to acknowledge the limited scope of the 1972 amendment to Title VII as interpreted in Amos." (Reply Comments, p. 5). Under their view, Title VII, as interpreted in Amos, protects only the nonprofit activities of religious employers.

The facts in Amos involved only nonprofit activities by a religious organization. The Court, therefore, quite properly decided the case on the facts before it. The Court did not say that it would hold Title VII unconstitutional if a religious organization invoked its protection in employment decisions involving profit-making activities.

Indeed, by trying to dismiss Amos as applicable only to nonprofit activities by a religious employer, Americans United for Separation of Church and State ignores the important principles

articulated in Amos in support of the view that religious broadcasters have substantial First Amendment protection to consider religion in their hiring decisions. Although the Court in Amos specifically did not determine whether the First Amendment required the exemptions granted by Title VII to religious organizations, it noted several constitutional arguments in support of the Title VII protection of a religious organization's right to hire employees who share its religious viewpoints. As discussed in CLS' comments of July 11, 1996, pp. 4-7, in Amos, the Supreme Court concluded that laws forbidding religious preferences in hiring by religious organizations create "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 335. Both free exercise and establishment clause values are implicated when a religious organization is "requir[ed]..., on pain of substantial liability, to predict which of its activities a secular court will consider religious." Id. at 336. Moreover, the government activity required to enforce such a distinction between religious and secular activities "results in considerable ongoing government entanglement in religious affairs," 483 U.S. at 343 (Brennan, J., concurring), which is the type of entanglement forbidden by the Establishment Clause.

4. Diversity is enhanced by protecting the right of religious broadcasters to be religious. Americans United for Separation of Church and State insist that allowing religious broadcasters to consider applicants' religious viewpoints in filling all jobs would

"seriously impair efforts to promote civil rights and diversity in the broadcast industry." (Reply Comments, p.6). Actually, it is the current policy requiring religious broadcasters to fill most jobs regardless of the applicants' religious viewpoints that threatens both civil rights and diversity.

As to protecting civil rights, it is important to remember that religious liberty is among the most basic of civil rights. The religious broadcasters are not claiming any right to engage in invidious discrimination on the basis of race or gender. They simply wish to preserve their distinctive religious identity by hiring persons who share a specific religious viewpoint.

As to diversity, religious broadcasters themselves augment, in a vital way, the spectrum of viewpoints expressed on the airwaves, as they provide commentary on a variety of social issues from their distinctive religious viewpoints. "[T]he right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences [through the medium of broadcasting] is crucial here [and it] may not constitutionally be abridged either by Congress or by the FCC." FCC v. League of Women Voters, 468 U.S. at 377-378 (emphasis added) (citation and quotation omitted).

Indeed, the diversity argument actually reinforces the First Amendment argument of the religious broadcasters. According to the FCC, it believes that hiring decisions affect the perspective "likely to be aired" by a broadcaster. (Order and Notice of Proposed Rulemaking 96-49, February 16, 1996, at 3). If such decisions do affect programming content, then the First Amendment

should protect the religious broadcaster from being forced to hire employees who will affect the religious message of the station.

Finally, Americans United for Separation of Church and State suggests that the Commission has an obligation to promote diversity through "recruitment of minorities." (Reply Comments, p. 6). If Americans United for Separation of Church and State is referring to racial or ethnic minorities, their comment is irrelevant to CLS' comments; as explicitly and repeatedly stated, CLS does not challenge the FCC rules regarding racial minority hiring and promotion. If Americans United for Separation of Church and State refers to religious minorities, CLS respectfully submits that the Commission has no mandate or obligation to promote religious diversity among religious broadcasters. On the contrary, the best (if not the only) statement of Congressional mandate or policy in this area is found in Title VII, wherein Congress expressly disclaims any interest in or power over religious discrimination by religious employers [sections 702 and 703(e)(2)]. Moreover, Americans United for Separation of Church and State cannot substantiate its dubious speculation that, for example, nonChristians cannot break into the broadcast industry unless they are eligible for hiring by Pat Robertson's Christian Broadcasting Network (CBN).

In sum, Americans United for Separation of Church and State fails to address the serious constitutional infirmities with the Commission's present policy. Neither does it posit any Congressional mandate or rational (let alone compelling) interest

justifying the maintenance of a policy that requires religious broadcasters to surrender their religious convictions and hire persons who do not support the religious message the broadcasters wish to convey.

Very truly yours,

CHRISTIAN LEGAL SOCIETY

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